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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 689

E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,
Appellants,

vs.

ANDREW J. DuPRE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

JOHN M. DANIEL,
Attorney General of South Carolina;
T. C. CALLISON,
Assistant Attorney General of South Carolina;
R. HOKE ROBINSON,
Assistant Attorney General of South Carolina,
Counsel for Appellees.

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Appellees

MOTION TO DISMISS OR AFFIRM

Pursuant to the provisions of Rules 7 and 12 of the Supreme Court of the United States, the appellees move the Court to dismiss the appeal or in the alternative to affirm the judgment of the Court below upon the following grounds:

1. That the questions on which the decision of the cause depends are so unsubstantial as not to require further argument because:

(a) All Federal questions raised have been definitively answered by prior decisions of this Court;

(b) The State of South Carolina has jurisdiction to regulate fishing within its coastal waters within the three (3) mile maritime belt;

(c) The admiralty jurisdiction of the Federal Courts does not prevent South Carolina enforcing its own commercial fishing laws in its State Courts against its own residents;

(d) The appellants have failed to show that the statutes attacked are other than proper conservation measures.

2. That appellants have no proper standing in a Federal Court of Equity to justify the relief sought because:

(a) No boat belonging to appellants has been confiscated by the State under the confiscation provisions which are attacked, and when and if such confiscation is made an adequate remedy is available to the appellants in the Courts of South Carolina, which Courts should be permitted to pass initially upon the questions raised.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General of South Carolina;
T. C. CALLISON,
Assistant Attorney General;
R. HOKE ROBINSON,
Assistant Attorney General,
Attorneys for Appellees,
Andrew J. DuPre, et al.

Columbia, S. C.,

February 25, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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E. B. SHIPMAN AND E. A. SHIPMAN, INDIVIDUALLY, AND TRADING AS SHIPMAN BROTHERS, ET AL.,

Appellants,

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Appellees

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

The appellants, resident commercial fishermen of South Carolina, sought an interlocutory and permanent injunction before a Three Judge District Court, convened pursuant to Section 266 of the Judicial Code as revised in New Title 28, U. S. Code, Section 2284, against the enforcement by the appellees, who constitute the State Board of Fisheries, of certain "fisheries laws" of South Carolina. Appellants are represented by the same able counsel who brought the case of *Toomer* v. *Witsell*, 334 U. S. 385, in which case this Court upheld South Carolina's right to regulate fishing within the three (3) mile maritime belt and to impose a tax on shrimp

caught by non-resident fishermen in South Carolina waters, but invalidated as discriminatory the law which required a license from non-resident fishermen one hundred (100) times greater than that required from resident fishermen, and as an undue burden on commerce the law requiring shrimp caught by a non-resident fisherman to be brought into South Carolina ports, unloaded, weighed, and stamped.

The plaintiffs in the *Toomer* case were all nonresident Georgia fishermen. In the present case the appellants are all resident South Carolina fishermen who make a broadside attack upon South Carolina fisheries laws enacted since the Toomer decision and also attack several of the laws in existence at the time of the Toomer decision, some of which were specifically upheld in that case. They attack the validity of the closed season and of that portion of the closed season law empowering the State officers to seize and confiscate boats for violating the closed season law, alleging that these laws violate the due process clause. They also contend that the enforcement of the confiscation provisions is a matter within the exclusive admiralty jurisdiction of Federal Courts and not enforceable in the State Courts. They further contend that South Carolina has no jurisdiction to regulate fishing within the three (3) mile belt and that the statute creating a presumption that the master is on board when a vessel is charged with violating the fishing laws is unconstitutional under the due process clause.

At the hearing before the Three Judge Court a final decree was issued on January 30, 1950, dismissing the action and denying the application for a declaratory judgment and an injunction. The Court held that the plaintiffs had shown threatened irreparable damage sufficient to justify a Federal Court of Equity in assuming jurisdiction, but on the merits held the South Carolina statutes valid. It was held

that the provisions for forfeiture did not impinge upon the admiralty jurisdiction of Federal Courts.

It is the appellees' position that the constitutional questions raised by appellants are so unsubstantial as not to require argument and that as to the forfeiture provisions, concerning which appellants devoted most of their argument in the Court below, they have an adequate remedy at law in the Courts of South Carolina if and when South Carolina seeks to enforce these provisions against the appellants or any of them. Authorities supporting these positions are cited below.

I

Appellants' constitutional questions are without substance, having been settled by decisions of this Court.

A. South Carolina has jurisdiction to regulate the fisheries within its territorial limits including the three (3) mile maritime belt. *Toomer* v. *Witsell*, 334 U. S. 385; *Skiriotes* v. *Florida*, 313 U. S. 69; *McCready* v. *Virginia*, 94 U. S. 391.

B. *The Closed Season.* South Carolina has had a closed season on shrimping in the marginal seas since 1925. Acts of 1925, page 225; Code of 1932, Section 3408; Code of 1942, Section 3408. The closed season extends from January through May of each year. Acts of 1948, page 2058. The appellants failed utterly to sustain the burden of proving that the closed season is so unreasonable and arbitrary as to have no relation to the police and conservation powers of the State over its natural resources. Whether the challenged act is wise or unwise is for the Legislature, not for the Courts. *Daniel* v. *Family Security Life Insurance Company* 93 L. Ed. (adv.) 483. In the *Toomer* case, *supra*, at which time the closed season consisted of four (4) months, from March through June, the Court stated that the validity

of the closed season was not questioned. 334 U. S. 389. See *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 30; *Hynes* v. *Grimes Packing Company*, 93 L. Ed. (adv.) 964.

C. The argument that the enforcement of the challenged South Carolina laws rests exclusively in the admiralty jurisdiction of Federal Courts is conclusively answered, as the Court below pointed out, by the case of *Hendry* v. *Moore*, 318 U. S. 133. In the oral argument below appellants did not even mention this point.

D. The South Carolina license fee on shrimp boats, imposed at the rate of One Dollar ($1.00) per foot keel measure, is reasonable. *Toomer* v. *Witsell*, 334 U. S. at 399.

E. The attack upon the South Carolina law permitting inspectors of the Fisheries Board to enter upon vessels and arrest without warrant persons found violating the fishing laws has no merit from the constitutional viewpoint. The search and seizure provisions of the Fourth Amendment are not a part of that due process required of the States by the Fourteenth Amendment, and South Carolina is among those States which permit the use in Court of evidence secured through illegal searches and seizures. *Wolf* v. *Colorado*, 93 L. Ed. 1356, 1361.

F. Appellants also attack the provision that the registered master or captain of the fishing boat shall be presumed to be aboard the boat when such boat is found violating any of the fisheries laws. This is a mere rule of procedure and a presumption which may be rebutted by evidence. Such provisions are frequently found in regulatory statutes.

The forfeiture provisions will be discussed in Section II *infra* of this Brief.

II

The forfeiture provisions are valid and appellants have an adequate remedy at law to test their validity.

In 1948 South Carolina amended Section 3408 of the Code, which section is concerned with the closed season for commercial shrimp fishing, to include a provision that the State authorities were authorized to confiscate boats, equipment, and rigging for violation of the closed season provisions and that such confiscation would be in accordance with the provisions of Section 3403 of the 1932 Code of Laws of South Carolina. In 1949 the State amended Section 3379, which is concerned with the licensing of shrimp boats, to include a provision that boats found shrimping without the required license could be confiscated.

The validity of the confiscation provisions of Section 3379 is not before the Court in the instant case because it is admitted that the required license has been obtained for each boat belonging to the appellants, and no seizure or threat of seizure for failure to obtain a license has been shown.

It is our position that the validity of the seizure provisions of Section 3408 is also not properly before the Court, because it is admitted that no boat of the appellants has been confiscated or sought to be confiscated under the closed season statute. We contend that when and if such a seizure is made the appellants have a plain and adequate remedy by claim and delivery or by writ of certiorari to test in the State Courts the validity of the forfeiture.

Assuming, however, for the sake of argument that the threat of seizure is sufficient to confer jurisdiction on the Federal Court of Equity, the appellants have failed to show any lack of due process in the seizure provisions of the closed season law. Section 3403 of the 1932 Code, which

Section is incorporated by reference into Section 3408 as amended provides for a proceeding upon a hearing before the Board of Fisheries, and that the vessel, etc., may be condemned and sold after advertisement as provided for Sheriff's sales. Since no actual forfeiture is before the Court in the instant case, the Court must presume in passing upon the validity of the forfeiture provisions that those provisions will be so interpreted and administered by the officer or administrative body charged therewith as to render valid their application. *Bourjois, Inc.* v. *Chapman, Inc.*, 301 U. S. 183; 16 C. J. S., Constitutional Law, Section 100.

The provisions for advertisement before sale gives the condemnee the opportunity, if he desires, to protect himself by bringing claim and delivery proceedings or by seeking review of the board action in the State Courts by writ of certiorari. *Jones* v. *State Board of Fisheries*, 161 S. C. 309, 159 S. E. 651; *Feldman* v. *South Carolina Tax Commission*, 203 S. C. 49, 26 S. E. (2d) 22; *Durant* v. *Bennett*, 54 F (2d) 634.

In addition to the procedure provided in Section 3408 as amended, South Carolina has a general provision relating to forfeiture set out in Section 846 of the 1942 Code which provides that whenever, by the provisions of law, any property is forfeited to the State, an action for the recovery of such property, alleging the ground of the forfeiture, may be brought by the proper officer in the Circuit Court. Whether the State in seeking to forfeit a shrimp boat would proceed under Section 3408 as amended or under the general forfeiture provision in Section 846 is not clear, since no actual test of the forfeiture provision has been made, and in the one case where the boat of a Georgia fisherman not a party to this action was seized for fishing without a license, it was shown that the owner posted Five Hundred

Dollars ($500.00) bond, which with his consent was forfeited to the State, and the boat returned to him.

This Court will not decide constitutional questions ahead of the necessity therefor, *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 462; and where the question is one of state procedural due process which presents no fact situation and which has not been tested in the State Courts it is especially appropriate for the Federal Courts to remit the matter to the State Courts for an interpretation of the State procedure. *East Coast Lumber Terminal* v. *Town of Babylon*, 2d Cir., 1949, 174 F. (2d) 106. Cf. *Parker* v. *Los Angeles*, 94 L. Ed. (adv.) 133.

Conclusion

It is submitted that the constitutional questions raised by the appellants are unsubstantial, that appellants have no standing in a Federal Court of Equity to enjoin enforcement of these State criminal laws and that the Court should dismiss the Appeal or affirm the action of the Court below.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General of
South Carolina;
T. C. CALLISON,
Assistant Attorney General;
R. HOKE ROBINSON,
Assistant Attorney General,
Attorneys for Appellees,
Andrew J. DuPre, et al.